

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32299 (Sub-No. 1)

NORFOLK SOUTHERN RAILWAY COMPANY
— CONSOLIDATION OF OPERATIONS —
CSX TRANSPORTATION, INC.

[PETITION FOR SUPPLEMENTAL ORDER]

Decision No. 3

Decided: December 2, 2005

In this decision, the Board authorizes petitioners, CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NSR), to carry out a modification to one aspect of a series of transactions that the Interstate Commerce Commission (ICC) approved in 1993. See Norfolk Southern Railway Company—Consolidation of Operations—CSX Transportation, Inc., Finance Docket No. 32299 (ICC served Nov. 26, 1993) (Coordination Decision). The modification is to have CSXT, rather than NSR, perform switching services for both carriers in the Newberry, SC area, a change that the carriers have concluded will improve the efficiency of both carriers' operations and service to customers in the Newberry area.

BACKGROUND

On July 7, 1993, CSXT/NSR filed an application pursuant to 49 U.S.C. 11343 (now 49 U.S.C. 11323) et seq., and 49 CFR part 1180 seeking ICC approval for a series of transactions involving the consolidation of certain operations in South Carolina. The proposed consolidation consisted of a series of trackage rights agreements, joint use agreements and operating agreements. Two of those agreements—a 1993 Newberry Operating Rights Agreement and a 1993 Newberry Switching Agreement—concerned operations in the Newberry area, where both railroads have lines and serve customers. Those two agreements provided that NSR would perform switching services for both railroads in the Newberry area, switching cars between interchange tracks in Newberry owned by CSXT and customers located on the lines of both railroads in Newberry and nearby Prosperity, SC. The 1993 Newberry Switching Agreement detailed the terms of NSR's switching services, and the 1993 Newberry Operating Rights Agreement provided for a grant by CSXT to NSR of operating rights over certain CSXT lines necessary to permit NSR to switch cars to and from CSXT customers in the area.

In the Coordination Decision, the ICC approved the application. The ICC found the proposed consolidation to be a “minor transaction,” see 49 CFR 1180.2(c), and it found that the proposed consolidation would not result in a change in the competitive balance between CSXT and NSR in South Carolina.

THE CSXT/NSR SUPPLEMENTAL ORDER PETITION

On August 17, 2005, CSXT/NSR filed a joint petition for a supplemental order¹ to permit the modification of one aspect of the 1993 consolidation. Specifically: (1) NSR would cease operations over CSXT trackage between milepost (MP) 33.1 and MP 47.5 in Newberry County, SC, which NSR now uses to perform switching services in the Newberry, SC area for both itself and CSXT; and (2) CSXT would acquire rights over NSR tracks to operate (i) between NSR MP V 47.1 and NSR MP V 49.0 in Newberry County, SC, and (ii) between NSR MP V 42.0 and NSR MP V 36.0 in Prosperity, SC, for the sole purpose of performing switching operations for the customers of both carriers.

In conjunction with its supplemental order petition, CSXT/NSR filed a joint motion for a protective order to cover the agreements entered into to carry out the proposed modification, specifically the 2005 Newberry Operating Rights Agreement and the 2005 Newberry Switching Agreement. In Decision No. 1 (served September 1, 2005), the Board granted the joint motion for a protective order, finding that the petitioners’ joint motion conformed to the Board’s rules at 49 CFR 1104.14, governing protective orders to maintain the confidentiality of materials submitted to the Board. Unredacted versions of the agreements were subject to the Protective Order and Undertakings, ensuring that the railroads’ confidential information would be used solely for this proceeding and not for other purposes.

In Decision No. 2 (served September 12, 2005), the Board established a procedural schedule for the processing of the supplemental order petition. The procedural schedule provided that any person who wished to file comments about the petition would have until October 6, 2005, to file such comments, and that petitioners would have until October 21, 2005, to reply to any such comments. No comments were filed by the due date.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. See, e.g., Canadian National Railway — Control — Illinois Central Corp. [General Oversight], STB Finance Docket No. 33556 (Sub-No. 4), slip op. at 3 (STB served Dec. 27, 2001); Union Pacific/Southern Pacific Merger, 2 S.T.B. 251, 253 n.3 (1997). Cause must exist to authorize an alteration of a previously approved transaction. For approval, we must find this modification to be consistent with the public interest. In determining the public interest, the benefits of the

¹ Under 49 U.S.C. 11327, “[w]hen cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326”

modified transaction must be balanced against any harm to competition or to essential service(s) that cannot be mitigated by conditions.

The petitioners serving the Newberry area have determined that replacing NSR with CSXT as the switching railroad for both carriers will make both carriers' operations more efficient and economical, without harming competition or essential services, and will actually improve service to customers in that area. Petitioners' assessment is unrefuted.

Accordingly, because the record in this proceeding demonstrates that the proposed modification is consistent with the public interest, we will approve the modification and issue a supplemental order.

Petitioners contend that the employee protective conditions imposed on the original transaction in the Coordination Decision continue to apply to employees who may be adversely affected by the proposed modification. Petitioners anticipate no significant adverse effect on their employees. NSR expects that the proposed changes in operations will result in the abolishment of a three-man switching assignment currently performing switching services in Newberry; however, it is anticipated that the employees currently assigned to that job would exercise seniority to other positions in their seniority district. CSXT expects that there will be no adverse effects on its employees.

To ensure that employees are protected from any adverse effects caused by this modification to the transaction, we will impose the same employee protective conditions imposed in the Coordination Decision. In addition, any employee affected by the discontinuance of trackage rights will be protected by the conditions set out in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

FINDINGS

We find that the proposed modification, as conditioned herein, is consistent with the public interest.

We further find that any rail employees of petitioners affected by the modification will be protected by the conditions set out in Mendocino Coast Ry., Inc.—Lease & Operate, 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980), aff'd sub nom. Railway Labor Exec. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982). Any employee affected by the discontinuance of trackage rights will be protected by the conditions set out in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The modification, as described in the CSXT/NSR petition filed August 17, 2005, is approved.
2. If petitioners carry out the modification, they shall advise the Board in writing, within 10 days thereafter, that they have carried out the modification.
3. No further change or modification shall be made in the terms and conditions of the modification, as set forth in the CSXT/NSR petition filed August 17, 2005, without the prior approval of the Board.
4. Approval of the modification is subject to the conditions for the protection of railroad employees set out in Mendocino Coast Ry.—Lease & Operate, 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980), aff'd sub nom. Railway Labor Exec. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982). Any employee affected by the discontinuance of those trackage rights will be protected by the conditions set out in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).
5. This decision is effective on the service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary